

Dr. Michael Potter 01/09/2018

<p>1 POTTER</p> <p>2 environments, but residential settings would</p> <p>3 be the main target.</p> <p>4 Q. There was an October 25, 2017</p> <p>5 e-mail from Jen Hostetler to you that was</p> <p>6 redacted. Do you know why it was redacted?</p> <p>7 A. No. I know who Jen Hostetler</p> <p>8 -- well, she's I believe an i2L employee that</p> <p>9 works off site in Florida, but I do not.</p> <p>10 (Exhibit 4, Documents, marked</p> <p>11 for Identification.)</p> <p>12 Q. Let me show you what we marked</p> <p>13 as Exhibit number 4. Exhibit 4 is a group</p> <p>14 exhibit. The first page of it is the fee</p> <p>15 structure agreement between Bursor & Fisher</p> <p>16 and yourself and then there are invoices, I</p> <p>17 believe your invoices for the work you have</p> <p>18 done in this case; is that correct?</p> <p>19 A. Correct.</p> <p>20 Q. The first page of Exhibit 4</p> <p>21 it's at least dated signed by Mr. Kopel on</p> <p>22 November 7, 2016, do you see that?</p> <p>23 A. Correct.</p> <p>24 Q. Is that about the time where</p> <p>25 you believe you were first contacted</p> <p style="text-align: right;">137</p>	<p>1 POTTER</p> <p>2 which are part of Exhibit 4?</p> <p>3 A. I keep daily time sheets in</p> <p>4 constructing this, the invoices and</p> <p>5 handwritten notes of amount of time spent</p> <p>6 talking on the phone with counsel, amount of</p> <p>7 time reviewing documents and then I summarize</p> <p>8 all that and I put it into this, but I don't</p> <p>9 keep those handwritten daily records.</p> <p>10 Q. Those are thrown away?</p> <p>11 A. Correct.</p> <p>12 Q. If you look at the first</p> <p>13 invoice I have in Exhibit 4 it's dated August</p> <p>14 17, 2017, do you see that?</p> <p>15 A. Yes.</p> <p>16 Q. I take it that whatever work is</p> <p>17 done within this invoice was done prior to</p> <p>18 August 17, 2017, correct?</p> <p>19 A. Correct.</p> <p>20 Q. I note there are some dates</p> <p>21 with respect to telephone conversations where</p> <p>22 you have dates on there, right?</p> <p>23 A. Excuse me, I'm just looking at</p> <p>24 the notation here of under consultation;</p> <p>25 further analysis, compilation and mailing of</p> <p style="text-align: right;">139</p>
<p>1 POTTER</p> <p>2 concerning this case?</p> <p>3 A. Seems about right.</p> <p>4 Q. Is this first page -- this is</p> <p>5 your fee structure agreement, correct?</p> <p>6 A. Correct.</p> <p>7 Q. So you would have provided this</p> <p>8 to Mr. Kopel to sign, correct?</p> <p>9 A. Correct, yeah, I e-mailed it to</p> <p>10 him and at some point I assume it took him a</p> <p>11 while to decide whether they wanted to retain</p> <p>12 me, but that's the date they signed it.</p> <p>13 Q. I just want to go over the</p> <p>14 invoices. I have as part of Exhibit 4 four</p> <p>15 invoices for your work in this case, correct?</p> <p>16 A. Correct.</p> <p>17 Q. Are there any other invoices</p> <p>18 you submitted as of today other than the four</p> <p>19 invoices that make up part of Exhibit 4?</p> <p>20 A. I believe I submitted an</p> <p>21 invoice associated with the writing of the</p> <p>22 rebuttal report I don't know in the last week</p> <p>23 or so.</p> <p>24 Q. Did you keep any time sheets</p> <p>25 other than what's indicated in these invoices</p> <p style="text-align: right;">138</p>	<p>1 POTTER</p> <p>2 scientific literature so there may have been</p> <p>3 an invoice prior to this if these are in time</p> <p>4 sequence.</p> <p>5 Q. Okay.</p> <p>6 A. That's typically what I say if</p> <p>7 I'm continuing on a project.</p> <p>8 Q. So if there was a prior</p> <p>9 invoice, the work that you have on this first</p> <p>10 August 17, 2017 invoice would have been your</p> <p>11 work from when you issued the prior invoice</p> <p>12 to whatever date is on this current invoice;</p> <p>13 is that how you would usually do it?</p> <p>14 A. Correct.</p> <p>15 Q. The next invoice in this</p> <p>16 exhibit is dated October 8, 2017, do you see</p> <p>17 that?</p> <p>18 A. Yes.</p> <p>19 Q. I'm assuming and am I correct</p> <p>20 then that the work that's shown in this</p> <p>21 invoice would have been done by you after</p> <p>22 August 17, 2017 up to October 8, 2017,</p> <p>23 correct?</p> <p>24 A. Correct.</p> <p>25 Q. The third invoice within</p> <p style="text-align: right;">140</p>



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1 POTTER
2 Exhibit 4 is dated November 3, 2017, correct?
3 A. Correct.
4 Q. I take it that the work that's
5 shown here would have been done from the time
6 period of October 8, 2017 up to November 3,
7 2017, correct?
8 A. Correct.
9 Q. And the last -- oh, I'm sorry,
10 this wouldn't be -- this is out of place a
11 little bit. This invoice the last one is
12 actually dated November 30, 2016, do you see
13 that?
14 A. Correct.
15 Q. Do you believe this November
16 30, 2016 was your first invoice?
17 A. No, see this is November 30,
18 2016. This was the first invoice.
19 Q. That's what I just said.
20 A. I'm sorry, I'm looking at it in
21 chronological order here and it does look
22 like the first invoice, yeah, because it has
23 less the retainer.
24 Q. The testing that was done by
25 Sierra Labs, does that indicate that the mice

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1 POTTER
2 will remain where food and shelter is ample
3 even though a repeller is present?
4 A. No. The data didn't
5 demonstrate that because in the untreated
6 controls even though the food and -- the food
7 and the water being the big difference were
8 only in the front, but in the untreated
9 controls they were evenly distributed between
10 the front and back so I think it just further
11 shows that mice are constantly moving around,
12 probably the most crucial resource being the
13 place to be that's safe.
14 Q. I want to go over your first
15 report Exhibit number 1 dated October 31,
16 2017.
17 A. Okay.
18 Q. Exhibit number 1, I'm actually
19 on page 1 of the exhibit where it starts at
20 the top introduction. You did number your
21 paragraphs?
22 A. Correct.
23 Q. Paragraph number 2, that has
24 your conclusion with respect to this report
25 that you conclude that the devices are

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1 POTTER
2 ineffective for their stated purposes and can
3 neither repel nor drive out any of these
4 critters; did I read that correctly?
5 A. Correct.
6 Q. You did Roman VI Overview of
7 Ultrasonic and Electromagnetic Technology
8 where essentially you go through other
9 publications or articles and make citations?
10 A. Correct.
11 Q. I take it whatever you included
12 within this section you found in these
13 articles and citations?
14 A. Yes. I have to read all this
15 to make sure -- there may have been things I
16 say here, but basically yeah, this is sort of
17 a summation of some of the literature that's
18 out there.
19 Q. None of these publications that
20 you cite to actually tested the Bell & Howell
21 devices, correct?
22 A. Correct.
23 Q. In some of these tests done by
24 these other folks that you have cited to,
25 they included other pests beyond roaches,

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1 POTTER
2 ants, spiders and mice, correct?
3 A. Some of them involve rats. The
4 bulk of these studies were designed for
5 roaches, ants, spiders and rodents. There
6 may have been a review article that sort of
7 capsuled other nuisance wild life as well,
8 the Bomford article and I believe one of the
9 Koehler articles may have, but when we get to
10 the ones that I specifically talk about the
11 devices which I think is later in this
12 document, those were exclusively on those.
13 Q. You discuss within this
14 subsection Roman numeral VI electromagnetic
15 devices, correct?
16 A. Correct.
17 Q. If the devices here at issue do
18 not involve electromagnetic sound waves, you
19 will agree with me that what you listed here
20 for electromagnetic devices is not relevant?
21 MR. KOPEL: Objection,
22 misstates the record.
23 A. The reason I included the
24 electromagnetic technology, a review of the
25 literature on that was because at least one

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1 POTTER
2 of the pest repellent devices of Bell &
3 Howell includes a combination of
4 electromagnetic and ultrasonic. In fact,
5 that was one of the devices that we evaluated
6 with Mr. Mankin initially in trying to make a
7 determination of which device we would
8 evaluate in the subsequent insect and rodent
9 studies.
10 Q. Have you tried to obtain the
11 actual devices that were tested by any of
12 these other authors of these publications to
13 actually compare them with the Bell & Howell
14 device?
15 A. No, but I of course read the
16 studies and many of the studies included
17 specific physical characteristics of these
18 other manufacturer's devices and respective
19 frequency and amplitude and cycles and
20 variable output.
21 Q. If the decibel level of the
22 devices that were tested in these articles is
23 below 70, would then the results be
24 irrelevant to your opinions with respect to
25 the Bell & Howell devices?

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1 POTTER
2 so certainly some of those could have been
3 intended for those uses.
4 Q. Would you agree with me that
5 testing done to devices that are not the Bell
6 & Howell devices in a rural setting would not
7 be relevant to determine the effectiveness of
8 the Bell & Howell devices?
9 A. No, I would not agree with
10 that.
11 Q. Would you agree with me that
12 devices that had decibel levels below 60
13 would not be relevant in determining whether
14 the Bell & Howell devices are effective?
15 A. As stated previously, it would
16 depend on the facts of how those measurements
17 were taken and at what distance from the
18 transducer.
19 Q. Have you done any study to
20 account for the distance in which the devices
21 were measured in all of these publications
22 that you cite to?
23 A. Could you repeat the question?
24 MR. OSTOJIC: Could you repeat
25 it.

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1 POTTER
2 A. No, not necessarily.
3 Q. So the decibel level of the
4 Bell & Howell devices was between 87 and 99
5 decibels, right?
6 A. At a specific distance from the
7 transducer which I -- I would have to go back
8 to the documents to see what that was, but it
9 was relatively close whereas in some of these
10 experiments those distances were either
11 further away or evaluated at varying
12 distances away so you have to be careful to
13 compare apples to apples in terms of distance
14 from a device.
15 Q. Were any of the devices that
16 were tested in these publications that you
17 cite to, were they intended for rural
18 settings?
19 A. Could you repeat the question?
20 Q. Were the devices that were
21 tested by some of these authors that you cite
22 to in Exhibit 1, were they intended to be
23 used in a rural setting?
24 A. Some of the rodent evaluations
25 were conducted in non-residential buildings

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1 POTTER
2 (Record read.)
3 A. I have read these articles
4 thoroughly and many of them do specify the
5 distance from the device that the sound
6 measurements were taken, but I would have to
7 go back to each article and produce those
8 because I can't recall them all.
9 Q. You mention that devices can be
10 different based on their decibel level and
11 the frequency used, correct?
12 A. Correct.
13 Q. Are there any other variables
14 that can distinguish ultrasonic pest
15 repellers from one another?
16 A. The other variable is the
17 variability of the output, the cycling or the
18 intervals between the sound waves so
19 generally many of the devices that are on the
20 market now or even that were tested at that
21 time had a variable output which was probably
22 intended to reduce the likelihood of
23 habituation by the animals particularly
24 rodents.
25 Q. What about the number of

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1 **POTTER**
 2 **speakers within a device, does that**
 3 **distinguish the various devices?**
 4 A. It shouldn't. The sound output
 5 in terms of frequency and amplitude and the
 6 variation of that sound should be the driver
 7 of the performance of the device. It's much
 8 like I have a big old Gateway computer at
 9 home that's much larger than my current
 10 computer, but the current one is much more
 11 powerful so you have to look at the physics
 12 of the device and what the output is, not the
 13 number of speakers. Without knowing those
 14 characteristics, it's really immaterial to
 15 me.
 16 Q. You have not actually tested
 17 those devices with the Bell & Howell device,
 18 any of the devices of these publications that
 19 you cite to, correct?
 20 MR. KOPEL: Objection to form.
 21 A. Are you asking have I compared
 22 those devices and studies with the Bell &
 23 Howell? I don't understand.
 24 Q. Have you purchased or obtained
 25 any of the devices that were tested by these

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1 **POTTER**
 2 **authors that you cite to in your report?**
 3 A. NO.
 4 Q. You have done no testing to
 5 actually determine how similar or how
 6 different the Bell & Howell devices are to
 7 any of the devices that are cited in the
 8 publications that you've included in your
 9 report, fair?
 10 A. Not exactly. When you say
 11 testing, I interpret that as being have I
 12 reviewed the published studies on these
 13 devices and their physical characteristics
 14 that were measured by these authors which are
 15 all summarized in my report and what I found
 16 was that those physical output
 17 characteristics were very similar to the
 18 physical characteristics of frequency and
 19 amplitude and variability to the Bell &
 20 Howell devices so it seems very appropriate
 21 to make comparisons between those devices.
 22 Whether the device had purple
 23 plastic casing or had two speakers or one, I
 24 mean the physical characteristics or the
 25 output of the device is what's important so

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1 **POTTER**
 2 no, I didn't test those specifically, but I
 3 think we can bridge the information from
 4 those studies to the Bell & Howell study
 5 although again we wanted to conduct studies
 6 on the Bell & Howell devices as well which is
 7 what we did.
 8 Q. So you don't believe that the
 9 quality of manufacturer or the materials used
 10 in devices is important in determining
 11 whether devices are similar or different,
 12 fair?
 13 A. What's important is measuring
 14 the physical characteristics of the devices.
 15 Ultrasound is ultrasound from the standpoint
 16 of if you know the frequency and the
 17 amplitude and the variability of the sound
 18 waves, that's what's important, not who made
 19 it or what the container looked like or if it
 20 had one outlet or night light on it.
 21 Q. You believe ultrasound is
 22 ultrasound and it doesn't then matter what
 23 the device is, how it was made, how many
 24 speakers are in there, it essentially all
 25 works the same; is that fair?

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1 **POTTER**
 2 A. When I said ultrasound is
 3 ultrasound, I meant that if you know the
 4 output characteristics, the physical
 5 properties of the device, that's what's
 6 important. The physics of ultrasound is a
 7 constant. The manufacture and the packaging
 8 of the product being sold is largely
 9 immaterial.
 10 Q. Why didn't you include any of
 11 these publications except for two in your
 12 file?
 13 MR. KOPEL: Objection, asked
 14 and answered.
 15 A. All of these publications that
 16 are cited in my report are cited in the
 17 reference citations and as I said earlier,
 18 they are all readily available through online
 19 searching for these publications so they were
 20 provided to counsel.
 21 Q. So your counsel Mr. Kopel has
 22 all of these publications that you know of so
 23 you provided it to counsel?
 24 MR. KOPEL: Objection, don't
 25 answer that question.

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<p>1 POTTER</p> <p>2 Q. You just answered. You said</p> <p>3 that you provided it to counsel. I want to</p> <p>4 make sure that's what you said?</p> <p>5 MR. KOPEL: Don't answer that</p> <p>6 question.</p> <p>7 Q. Are you not going to answer the</p> <p>8 question?</p> <p>9 A. I have been instructed by</p> <p>10 counsel not to answer it so I guess I ought</p> <p>11 not to answer it.</p> <p>12 Q. Have you tried to contact any</p> <p>13 of the authors of these publications about</p> <p>14 their testing?</p> <p>15 MR. KOPEL: Objection, asked</p> <p>16 and answered.</p> <p>17 A. I have not tried to contact any</p> <p>18 of these authors. I take that back. One</p> <p>19 author Richard Mankin who helped us with the</p> <p>20 quantification of the sound output of the</p> <p>21 devices, I did read his publication. I can't</p> <p>22 recall whether it was prior or after speaking</p> <p>23 with him. I think it was prior. I read it</p> <p>24 before I spoke with him.</p> <p>25 Q. I'm going to jump to in Exhibit</p> <p style="text-align: right;">153</p>	<p>1 POTTER</p> <p>2 common indoor cockroach in residential</p> <p>3 settings. Odorous house ants as I talked</p> <p>4 about and cellar spiders are certainly one of</p> <p>5 the very top most common spiders in dwellings</p> <p>6 that people would purchase these devices to</p> <p>7 try to get rid of.</p> <p>8 Q. Is it fair to say that you are</p> <p>9 reporting on the testing that was done by i2L</p> <p>10 and Sierra Research was essentially what you</p> <p>11 took from their reports to you and either</p> <p>12 summarized or paraphrased their testing as</p> <p>13 well as their findings; is that fair?</p> <p>14 A. Not in my mind because I had a</p> <p>15 lot of input in designing these protocols.</p> <p>16 The Intertek protocol I pretty much designed</p> <p>17 myself. The rodent protocol was done in</p> <p>18 collaboration as I said with Dr. Corrigan and</p> <p>19 Dr. Donohue and there was discussion back and</p> <p>20 forth in the actual set up and conduct of the</p> <p>21 experiments. We talked many times back and</p> <p>22 forth, but then of course at some point I was</p> <p>23 not there to take the counts so the actual</p> <p>24 data collection was by these two companies.</p> <p>25 Q. For the cockroach test, there</p> <p style="text-align: right;">155</p>
<p>1 POTTER</p> <p>2 1 your Roman numeral VIII, the testing of the</p> <p>3 Bell & Howell devices. How many different</p> <p>4 species of cockroaches are there?</p> <p>5 A. Thousands, probably about 6,500</p> <p>6 if you want a number.</p> <p>7 Q. Why did you choose or why did</p> <p>8 i2L choose the odorous house ants for the</p> <p>9 testing?</p> <p>10 A. That was my decision. Odorous</p> <p>11 house ant is one of the most common indoor</p> <p>12 ants in the United States. It's also one</p> <p>13 that is readily easy to acquire for testing</p> <p>14 and it seemed like all three of these pests,</p> <p>15 the German cockroach, odorous house ant and</p> <p>16 cellar spider, by the way, that's an error</p> <p>17 that was transcribed from an earlier -- that</p> <p>18 scientific name of the cellar spider is</p> <p>19 incorrect, that's house spider, but bottom</p> <p>20 line is all three of these species were</p> <p>21 selected by me specifically because they</p> <p>22 represent very common pests in dwellings that</p> <p>23 a purchaser of this device would need to have</p> <p>24 this device work on if they had these</p> <p>25 problems. German cockroach by far the most</p> <p style="text-align: right;">154</p>	<p>1 POTTER</p> <p>2 were two sides, one had a repeller in it and</p> <p>3 one did not, correct?</p> <p>4 A. Correct.</p> <p>5 Q. There was dog food placed on</p> <p>6 both sides?</p> <p>7 A. Correct.</p> <p>8 Q. Would it be a flaw in the</p> <p>9 testing if the two sides were not identical?</p> <p>10 A. Well, not in the way that we</p> <p>11 conducted this experiment and the results we</p> <p>12 achieved and I will try to explain. In the</p> <p>13 cockroach experiment we had food and</p> <p>14 harborage on both sides. We released the</p> <p>15 cockroaches initially only on the side with</p> <p>16 the repeller. Again, the reason for doing</p> <p>17 that was much like in the rodent study, we</p> <p>18 wanted to simulate as close as we could in a</p> <p>19 laboratory experiment more of a realistic</p> <p>20 situation where you had existing a presence</p> <p>21 of cockroaches in a harborage, cockroaches of</p> <p>22 course aggregate, they defecate, they have</p> <p>23 pheromones so when you are trying to</p> <p>24 eradicate cockroaches in a dwelling with one</p> <p>25 of these devices, you will have an</p> <p style="text-align: right;">156</p>



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1 POTTER
2 established infestation with cockroaches
3 living in these protected locations.
4 Q. By providing a harborage for
5 the cockroaches, aren't you really testing
6 whether the Bell & Howell device will drive
7 cockroaches out that may be behind walls or
8 under floors?
9 A. We are trying to test this
10 device in the real world. All of these pests
11 are cryptic. They live in cracks and
12 crevices and voids between floors, behind
13 walls, within appliances and there is no way
14 to drive these pests out of their established
15 locations without having a harborage. Could
16 you gain meaningful information initially by
17 not including harborages in your experiments
18 as were some of the studies peer reviewed
19 work done previously, yes, but we had one
20 shot with these studies to try to simulate
21 what effect they would have in the hands of
22 the consumer which is why we devised the
23 experiments the way we did.
24 Q. Why do you say you had only one
25 shot?

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1 POTTER
2 A. Well, because of the court
3 imposed time line of production of evidence
4 in the case I was instructed what our time
5 line was.
6 MR. KOPEL: Stop. Don't reveal
7 any communications between me and you.
8 Q. Would you have wanted to do
9 testing of the Bell & Howell devices without
10 providing a harborage for the pests?
11 A. No.
12 Q. Is there anywhere in the Bell &
13 Howell instructions that you recall seeing
14 where it says it will repel pests that are
15 located behind walls or under floors?
16 MR. KOPEL: Could you repeat
17 the question.
18 (Record read.)
19 A. May I look at a copy of the
20 Bell & Howell label?
21 Q. Is this what you are looking
22 for?
23 A. For starters, yes. Could you
24 repeat the question one more time.
25 (Record read.)

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1 POTTER
2 A. No.
3 Q. By providing a harborage to the
4 pests, aren't you essentially testing whether
5 the Bell & Howell devices would repel or
6 drive pests out that are maybe located behind
7 walls or under floors; isn't that really what
8 the testing is doing?
9 MR. KOPEL: Objection, asked
10 and answered.
11 A. No, certainly if there was a
12 mouse harboring in a garage underneath a lot
13 of clutter and we put one of these things in
14 the living room, that would be an extreme
15 evaluation of this device, but by putting
16 these devices in these insect experiments
17 literally within three feet of the harborage
18 directed point blank at the harborage, these
19 roaches are not sitting in this device for
20 the entire experiment. Roaches on average
21 feed once a day at least based on research
22 done by Dr. Don Cochran, Dr. Jewel Silverman.
23 In other words, ants are
24 constantly foraging throughout the day so
25 it's a misnomer if there's any impression

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1 POTTER
2 that these roaches resided inside these
3 harborages for the entire experiments. They
4 did not. They just didn't move to the other
5 side of the arena.
6 Q. I take it you know from Dr.
7 Mankin's testing that cardboard harborages
8 will decrease the effectiveness of the Bell &
9 Howell devices, correct?
10 A. Correct.
11 Q. So isn't it true that if the
12 pests remain inside the harborage, that they
13 are essentially being shielded from the
14 effectiveness of the Bell & Howell devices,
15 correct?
16 A. If they stayed in the harborage
17 ad infinitum which they do not. I think in
18 the ant study I think in my report I showed
19 some pictures of ants that were foraging in
20 the report, but basically I have pictures
21 showing that the ants were foraging in the
22 arena, they were going for sugar so how else
23 does one drive these pests out of the
24 location? That was what we were trying to
25 evaluate.

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<p>1 POTTER</p> <p>2 Q. You will agree with me that</p> <p>3 cockroaches and ants will remain in their</p> <p>4 nest to protect the colony so long as there</p> <p>5 is food and sustenance for them, fair?</p> <p>6 A. Of course ants have nests,</p> <p>7 cockroaches tend to harbor, but they will</p> <p>8 often go back to those areas, but they will</p> <p>9 -- they sally forth to forage for resources</p> <p>10 in which case you would assume they would</p> <p>11 come in contact with these repellant</p> <p>12 materials.</p> <p>13 Q. In the tests done by i2L, the</p> <p>14 pests were provided with food and sustenance</p> <p>15 within the harborage, correct?</p> <p>16 A. Correct.</p> <p>17 Q. So you would not expect then in</p> <p>18 a real world --</p> <p>19 A. I'm sorry, I misspoke. Your</p> <p>20 question is they were provided with food and</p> <p>21 sustenance within the harborage, that's not</p> <p>22 correct. The harborage was the cardboard</p> <p>23 tube. The food and water was placed outside</p> <p>24 the harborage much as it would be if</p> <p>25 cockroaches were harboring in a crack</p> <p>161</p>	<p>1 POTTER</p> <p>2 dead flies.</p> <p>3 Q. i2L found that one replicate of</p> <p>4 the cockroach test showed a significant</p> <p>5 effectiveness of the Bell & Howell devices,</p> <p>6 correct?</p> <p>7 A. It showed a significant</p> <p>8 movement of the cockroaches to the</p> <p>9 non-repeller side in one replicate, yes.</p> <p>10 Q. That would show -- I take it</p> <p>11 that you believe if the roaches move away</p> <p>12 from the repeller, they are being repelled</p> <p>13 and its showing it's effective, correct?</p> <p>14 A. There was a significant</p> <p>15 difference in movement of the cockroaches in</p> <p>16 the cockroach study particularly in one</p> <p>17 replicate which pretty much forced it to</p> <p>18 significance of the three replicates, but we</p> <p>19 are looking at a totality of about 13 percent</p> <p>20 overall movement which it may be</p> <p>21 statistically significant, but it's</p> <p>22 biologically and commercially impractical or</p> <p>23 irrelevant in my view.</p> <p>24 Q. If you had sufficient time and</p> <p>25 resources, would you have done a test of the</p> <p>163</p>
<p>1 POTTER</p> <p>2 underneath your kitchen sink and then forage</p> <p>3 to the bottom of the cabinet.</p> <p>4 Q. In performing testing of a</p> <p>5 pest, wouldn't you want to starve the pest</p> <p>6 first before conducting the test?</p> <p>7 A. Absolutely not. In fact, every</p> <p>8 published study that's been conducted at</p> <p>9 least in my literature search on both insects</p> <p>10 and rodents either provided food or certainly</p> <p>11 had no mention of starvation of those</p> <p>12 organisms prior to that.</p> <p>13 Q. Do you know if the ultrasonic</p> <p>14 waves from the Bell & Howell devices could</p> <p>15 penetrate the plastic dishes that were used</p> <p>16 as harborage for the ants?</p> <p>17 A. I don't know, but again, it</p> <p>18 becomes in designing the experiment the</p> <p>19 plastic dishes were transferred so we could</p> <p>20 have an ant colony transferred into the</p> <p>21 location where the device was operating.</p> <p>22 That container had holes around the bottom of</p> <p>23 the device or the bottom of the chamber to</p> <p>24 allow the ants to freely forage out of the</p> <p>25 nesting location to the sugar water and the</p> <p>162</p>	<p>1 POTTER</p> <p>2 Bell & Howell devices on pests without using</p> <p>3 harborages?</p> <p>4 A. Probably not because there is a</p> <p>5 lot of literature on that already showing</p> <p>6 that they did not work. There was some</p> <p>7 literature, not as much, but there were some</p> <p>8 studies that were done with harborage. I</p> <p>9 specifically remember Wong's study on ants</p> <p>10 was done in the presence of harborage. I</p> <p>11 think he had wood chips that the ants were</p> <p>12 nesting in and there was a second one, I</p> <p>13 think his name is Osher, I believe an</p> <p>14 Egyptian fellow, I can get you the reference,</p> <p>15 that was done on cockroaches and one of the</p> <p>16 experiments he performed had sort of a</p> <p>17 simulated kitchen cabinet within the arena,</p> <p>18 but to answer your question, the bulk of the</p> <p>19 studies in the past were done without</p> <p>20 harborage and it clearly showed the vast</p> <p>21 majority of time there was either no effect</p> <p>22 or certainly no biological effect so we</p> <p>23 wanted again to try to design experiments</p> <p>24 that were a little bit more relevant to a</p> <p>25 real world setting.</p> <p>164</p>



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<p>1 POTTER</p> <p>2 Q. How long was the connecting</p> <p>3 tube between the repeller side and the</p> <p>4 untreated side for the cockroaches?</p> <p>5 A. I'll have to look at the</p> <p>6 experiment. I want to say about three to</p> <p>7 four feet, but if you want an exact number I</p> <p>8 can --</p> <p>9 Q. Who determined the size of the</p> <p>10 connecting tube?</p> <p>11 A. I determined the size. I think</p> <p>12 in the experiment we talked back and forth</p> <p>13 initially that we wanted to have our arenas,</p> <p>14 our paired chambers be at least 3 by 3 by 3</p> <p>15 as I recall. The size of the connecting tube</p> <p>16 I provided i2L with some other earlier</p> <p>17 research studies and I'm assuming they</p> <p>18 patterned the length of their connecting</p> <p>19 tube.</p> <p>20 Q. The harborage for the ants was</p> <p>21 painted black with India ink, correct?</p> <p>22 A. Correct.</p> <p>23 Q. What was the impact of having</p> <p>24 India ink used with respect to the</p> <p>25 effectiveness of the Bell & Howell devices?</p> <p>165</p>	<p>1 POTTER</p> <p>2 inside the connecting tube, were not</p> <p>3 considered as repelled, correct?</p> <p>4 A. That's correct, they were --</p> <p>5 MR. KOPEL: Were you done with</p> <p>6 your answer?</p> <p>7 THE WITNESS: No.</p> <p>8 MR. KOPEL: Please finish.</p> <p>9 A. They were not counted as</p> <p>10 repelled. They were accounted for after the</p> <p>11 experiment, but the decision was made to not</p> <p>12 count them in the case of the cockroaches.</p> <p>13 Our big concern was not disturbing the</p> <p>14 location of the insects and the spiders in</p> <p>15 the experiment.</p> <p>16 In the case of the ants we did.</p> <p>17 we used fiber optics to basically make those</p> <p>18 counts without disturbing the ants in the</p> <p>19 connective device. In the cockroaches we</p> <p>20 made the decision not to and in fact in every</p> <p>21 one of the other published studies on</p> <p>22 cockroaches where there was a connecting</p> <p>23 tube, in no case did they score those as</p> <p>24 being repelled. They either scored them as a</p> <p>25 separate category of just in the tube or they</p> <p>167</p>
<p>1 POTTER</p> <p>2 A. First of all, again, if I could</p> <p>3 have a protocol to look at, I could be</p> <p>4 certain of this, but from recollection the</p> <p>5 lid was then removed, but again, I need to</p> <p>6 see a protocol to be certain of that, but the</p> <p>7 important point is we had the identical</p> <p>8 harborage on both the repeller side and the</p> <p>9 non-repeller side both in the treatment</p> <p>10 arenas as well as in the untreated control</p> <p>11 arenas so whether -- if we had no untreated</p> <p>12 controls or we only had a dark harborage on</p> <p>13 one side, perhaps you could ask that</p> <p>14 question, but I think having included those</p> <p>15 controls and replications in the presence of</p> <p>16 the harborages on both sides in that</p> <p>17 experiment I think that if there was an</p> <p>18 effect, it would be the same effect.</p> <p>19 Q. Cockroaches that left the side</p> <p>20 where the repeller was and were in the</p> <p>21 connecting tube, they were not counted as</p> <p>22 repellent, correct?</p> <p>23 A. Could you repeat the question?</p> <p>24 Q. Cockroaches that had left the</p> <p>25 place where you had a repeller and were</p> <p>166</p>	<p>1 POTTER</p> <p>2 basically made a comment that whatever</p> <p>3 insects were on the left side or the right</p> <p>4 side of the chambers were in the tube.</p> <p>5 Q. Was the connecting tube for</p> <p>6 ants and cockroaches and the spiders PVC?</p> <p>7 A. Can I have my --</p> <p>8 Q. It should be in front of you.</p> <p>9 MR. KOPEL: If you are at a</p> <p>10 quick point I want to take a restroom</p> <p>11 break whenever.</p> <p>12 MR. OSTOJIC: Okay.</p> <p>13 A. These are black and white.</p> <p>14 Mine are in color, but it looks like a</p> <p>15 cardboard tube connected. I believe in the</p> <p>16 case of the ants, we used a smaller PVC tube</p> <p>17 with a connecting ramp.</p> <p>18 Q. The PVC tubing, you would</p> <p>19 expect that the ultrasonic waves from the</p> <p>20 Bell & Howell device would not be able to</p> <p>21 penetrate that, fair?</p> <p>22 A. Correct, but the PVC tube</p> <p>23 stopped at the outer edge of the chamber so.</p> <p>24 Q. There is a picture figure 5 in</p> <p>25 the i2L report that shows the PVC tube --</p> <p>168</p>



<p>1 POTTER</p> <p>2 A. I beg your pardon.</p> <p>3 Q. That shows the tube probably</p> <p>4 halfway into the enclosure where the Bell &</p> <p>5 Howell device was, correct?</p> <p>6 A. That's correct. I misspoke.</p> <p>7 It has a paper ramp going into the arena.</p> <p>8 Q. Who decided to use a ramp for</p> <p>9 the ants?</p> <p>10 A. In discussing the methodology</p> <p>11 for the experiment, we all agreed that it was</p> <p>12 important to have an accessible bridge to</p> <p>13 allow the insects or spiders to move back and</p> <p>14 forth. That decision was in fact I believe</p> <p>15 made by the i2L director of the study Timothy</p> <p>16 Ford. The intent was to -- ants are small so</p> <p>17 you had to have some easy way in which those</p> <p>18 ants could bridge from the lip of the PVC</p> <p>19 tube to the bottom of the plastic</p> <p>20 sub-enclosure which was inside a larger</p> <p>21 plywood chamber.</p> <p>22 Q. The Bell & Howell user manual</p> <p>23 states that it's the efficiency of the</p> <p>24 product is decreased when there's carpeting</p> <p>25 in the room, do you recall that?</p> <p style="text-align: right;">169</p>	<p>1 POTTER</p> <p>2 under carpet so I don't quite understand what</p> <p>3 relevance it would have. I understand</p> <p>4 obstructions, I understand fabric, but I</p> <p>5 don't understand why that would have any</p> <p>6 relevance to these tests or well, to these</p> <p>7 tests and why it would disqualify these tests</p> <p>8 as being a reasonable experiment.</p> <p>9 Q. But if the Bell & Howell</p> <p>10 instructions state that the effectiveness of</p> <p>11 its product is decreased when there's a</p> <p>12 barrier such as carpeting, why would you test</p> <p>13 the effectiveness of the product in an</p> <p>14 apartment with carpeting?</p> <p>15 A. First of all, I don't know if</p> <p>16 there was carpeting in the apartments. That</p> <p>17 would be a question that Bill Donohue would</p> <p>18 have to answer, but again, ultrasonic sound</p> <p>19 waves have tremendous directionality, high</p> <p>20 frequency, short wave lengths that are very</p> <p>21 directional so I don't know if these devices</p> <p>22 are plugged into a wall outlet that's on</p> <p>23 average 12 inches above the floor how they</p> <p>24 even would encounter a carpeted floor a foot</p> <p>25 below. They should be moving in a</p> <p style="text-align: right;">171</p>
<p>1 POTTER</p> <p>2 A. Correct.</p> <p>3 Q. The apartments in which testing</p> <p>4 for the mice was done, they included</p> <p>5 carpeting, didn't they?</p> <p>6 A. I'm not sure.</p> <p>7 Q. If the testing of the</p> <p>8 apartments did include carpeting, that was a</p> <p>9 flaw in the testing by Sierra, correct?</p> <p>10 A. No because Bell & Howell's</p> <p>11 instructions don't specifically say don't use</p> <p>12 this device in any household that has</p> <p>13 carpeting which is most of the households in</p> <p>14 the United States.</p> <p>15 Q. But you understand that the</p> <p>16 efficiency or the effectiveness of the Bell &</p> <p>17 Howell device is decreased when there's</p> <p>18 carpeting there in a room, correct?</p> <p>19 A. I have to say I don't</p> <p>20 understand that wording on the Bell & Howell</p> <p>21 instructions. I understand that ultrasonic</p> <p>22 waves don't go through fabric surfaces, but</p> <p>23 when we are talking about mice, rats,</p> <p>24 cockroaches, spiders and to a large extent</p> <p>25 ants, most of these pests are not foraging</p> <p style="text-align: right;">170</p>	<p>1 POTTER</p> <p>2 directional fashion which is again one of the</p> <p>3 inherent limitations of these devices.</p> <p>4 Q. Is it fair to say that Bill</p> <p>5 Donohue would be in a better position to</p> <p>6 explain what exactly went on with the testing</p> <p>7 in the Modesto, California apartments?</p> <p>8 A. Certainly I was not there for</p> <p>9 the recording of the data, but we talked</p> <p>10 extensively by telephone throughout the</p> <p>11 course of the study and of course in the</p> <p>12 design of the study so I think I have a</p> <p>13 pretty good handle on what was done. There</p> <p>14 are a few questions that I would have to ask</p> <p>15 him or someone would have to ask him as to</p> <p>16 whether the apartments were carpeted, but I</p> <p>17 don't think it has a great deal of relevance</p> <p>18 in the way these devices would need to work</p> <p>19 to be effective.</p> <p>20 Q. Rodents are territorial, right?</p> <p>21 A. Certainly I would say generally</p> <p>22 rats and mice are territorial, the males more</p> <p>23 than females, but generally yeah, mice want</p> <p>24 to carve out their own areas for nesting and</p> <p>25 so forth.</p> <p style="text-align: right;">172</p>



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1 POTTER
2 Q. By testing the mice in the
3 apartments and only allowing the mice to
4 acclimate in the room where the Bell & Howell
5 device was located, aren't you essentially
6 skewing the test results?
7 A. No for reasons I said earlier
8 that we wanted to evaluate the effect of
9 these devices in a real world setting where
10 you had an established infestation, we then
11 put the devices in to see if we could drive
12 them out of that area and again, the
13 untreated controls clearly demonstrated that
14 these mice were very happy to relocate to the
15 back part of the apartment with no presence
16 of a repeller so I don't think it made any
17 difference where the mice were initially
18 introduced.
19 Q. Isn't it true that the mice are
20 attracted to the food and water that was in
21 the front room of the Modesto, California
22 apartments?
23 A. Could you repeat the question?
24 Q. The tests that Sierra did, it
25 didn't have food or water in the back room,

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1 POTTER
2 right?
3 A. Correct.
4 Q. So the mice had essentially two
5 choices; go into the front room where the
6 food and water is or starve?
7 A. Well --
8 Q. Isn't that true though, those
9 were the choices?
10 A. If we had conducted the study
11 for six months, perhaps, but first of all,
12 mice don't starve in a short period of time
13 and dying of thirst which I think was in one
14 of the rebuttal reports is a little
15 ridiculous because mice can metabolize their
16 own water from their own bodies. They
17 require very small amounts of water as do
18 cockroaches and spiders and such, but no, I
19 think what the back and forth movement showed
20 and the presence of the mice being evenly
21 distributed in the untreated controls is
22 these mice are moving back and forth all over
23 the place and if these were highly effective
24 devices and highly repellant, those mice
25 would starve. They would not go into that

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1 POTTER
2 part of the room so I think it's
3 demonstrating that these things will not be
4 effective in driving mice out of an area and
5 keeping them out of an area and that area to
6 be really effective needs to be the structure
7 or the residence.
8 MR. KOPEL: We're going to take
9 a break.
10 MR. OSTOJIC: Okay.
11 (Recess taken.)
12 Q. Sir, you stated on paragraph 89
13 of Exhibit 1 of your initial report, "Since
14 the Bell & Howell pest repellents are marketed
15 to control existing infestations, they would
16 need to over power these aggregating odors in
17 order to 'drive pests out' of buildings."
18 Did I read that correctly?
19 A. Correct.
20 Q. What do you mean by control?
21 A. What I mean by control is to
22 eliminate the infestation which would
23 necessitate driving them out of the areas
24 where the pests were dwelling and I guess
25 drive them out and drive them out of the

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1 POTTER
2 building.
3 Q. That would be driving them out
4 of if they are located under the floors or
5 behind walls, correct?
6 A. That's the problems with these
7 devices. These pests live in these cryptic
8 locations behind and within stuff so somehow
9 if these pests are going to be driven out of
10 that dwelling whether it's a single family
11 home or an apartment or whatever, they will
12 have to be driven out and I can't figure out
13 how these devices will accomplish that with
14 all the inherent limitations they have.
15 Q. When you say control, you mean
16 to drive them out of their hiding places be
17 it behind walls or under the floors, correct?
18 MR. KOPEL: Objection;
19 misstates the testimony. You can
20 answer.
21 A. Can you repeat the question?
22 (Record read.)
23 A. Drive them out from wherever
24 they are.
25 Q. That would include behind walls

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1 POTTER
2 or under floors, correct?
3 A. Or the pests have moved out of
4 those areas and it's driving them out of the
5 exposed areas, but yes, it has to -- the
6 pests either through driving them out from
7 the device or the pests coming out on their
8 own, they have to be driven out of the
9 location where they are and out of the
10 structure.
11 Q. Nowhere in the user manual for
12 the Bell & Howell devices does it state that
13 it will control pest infestations, correct?
14 A. Not in those specific words,
15 however --
16 MR. KOPEL: Please let him
17 finish.
18 MR. OSTOJIC: We have wasted so
19 much time. I just want you to answer
20 my question. I understand you have a
21 lot to say.
22 MR. KOPEL: Finish your answer.
23 A. I don't want my testimony to be
24 taken out of context. I spent my entire
25 career, professional career evaluating

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1 POTTER
2 technologies, working with stakeholder
3 groups, homeowners, the professional pest
4 control industry to try to explain to them
5 how these devices or whatever the technology
6 works or doesn't and my interpretation of
7 reading the user instructions and the other
8 labeling materials that are so stated with
9 this device is a consumer reading that
10 material would assume that if they purchased
11 this device, plug it into an outlet or the
12 numbers that are required, it would solve
13 their pest problem and for a consumer, that
14 means if they have roaches, buy these
15 devices, put it in, now we don't have
16 roaches.
17 Q. There's nothing that you found
18 in the Bell & Howell user manual that states
19 that pests located behind walls or under
20 floors will be driven out; is that fair?
21 A. It's fair that they don't
22 specifically say that pests behind walls and
23 in these hidden locations would be driven
24 out. It just simply says drive them out and
25 leaves it to the imagination of a consumer

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1 POTTER
2 who doesn't understand that these pests are
3 living in these hidden locations. It has to
4 drive them out of those places.
5 Q. Did the user manual for the
6 Bell & Howell devices you read state that its
7 effectiveness is decreased if there is a
8 barrier to the sound waves, fair?
9 A. Correct.
10 MR. KOPEL: Can we look at the
11 document that's being referenced.
12 A. Is this what I should be
13 looking at?
14 Q. Did you review any other Bell &
15 Howell manual or instructions other than the
16 one that you are holding?
17 A. First of all, I didn't look at
18 the one with the night light, I looked at the
19 one that we tested, but I believe the
20 instructions are the same, Bell & Howell
21 ultrasonic pest repeller. I also went to
22 Bell&Howell.com and basically anything I
23 could find, the packaging materials which are
24 somewhat different in terms of what they say,
25 there is some caveats and things on those

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1 POTTER
2 that aren't on this so this is only one, but
3 of all the things that I looked at, it used
4 terms like repels, drives them out, don't
5 need to use messy dangerous sprays, don't
6 need to pick up dead animals and the
7 inference in reading all of the literature is
8 you plug these things in and your pest
9 problem is solved.
10 Q. You indicated several times
11 about real world tests, do you recall that?
12 A. Correct.
13 Q. Isn't the real world test what
14 the consumers have experienced when they
15 bought the Bell & Howell devices for their
16 own homes?
17 A. You have to clarify that
18 question because I don't understand what
19 you're saying.
20 Q. Have you tried to research what
21 consumers of the Bell & Howell devices
22 actually experience with the devices when
23 using them in their homes; have you done any
24 study like that?
25 A. No.

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1 POTTER
2 Q. Have you checked for any
3 testimonials or anything on the internet
4 about the comments consumers of the Bell &
5 Howell devices have concerning the
6 effectiveness of the Bell & Howell devices?
7 A. Only what I read in one of the
8 experts Dr. Borth's report where he did some
9 analysis of Amazon ratings of the device
10 online.
11 Q. Do you know how many consumers
12 have sought a refund from Bell & Howell with
13 respect after purchasing the Bell & Howell
14 devices?
15 A. No.
16 Q. Is that important to you?
17 A. No.
18 Q. Is it important to you to know
19 how consumers have reacted with respect to
20 the Bell & Howell devices when used in the
21 consumer's homes?
22 A. It's really not important to me
23 because like I said, I spent my entire career
24 talking to and educating homeowners and other
25 people that have pest problems and they often

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1 POTTER
2 believe or think that a certain approach is
3 effective because of the placebo effect and
4 it's hard to determine what these devices are
5 actually doing unless you actually evaluate
6 them in the kinds of control studies that
7 we've been talking about here today.
8 Q. You mention in your report
9 something about an FTC warning, do you recall
10 that?
11 A. Yes.
12 Q. Do you know when that warning
13 was issued?
14 A. I would have to go back to my
15 report. I think it would have been early
16 eighties. It would have been in the early
17 2000s, 2001, 2003 or at least a couple of
18 notifications there. This is paragraph 53 of
19 my report. There are other mentions of it in
20 my report, but I would have to dig more.
21 Here we go, Roger Gold, 1984, he did some of
22 his cockroach tests at the request of the FTC
23 and then somewhere in my report it talks
24 about requiring a number of companies to
25 either take their products off the market or

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1 POTTER
2 change their labeling or both and it's in my
3 report, but I would have to dig it out. If
4 you want me to, I will.
5 Q. The FTC warning was before
6 these Bell & Howell devices were actually
7 manufactured and sold, correct?
8 A. I don't recall the date of when
9 they were manufactured and sold. I know from
10 reading Ms. Feuerstein's deposition that they
11 have been selling these devices for a long
12 time, I guess more recently to Bell & Howell,
13 but I think they were selling them to other
14 companies with very similar characteristics
15 according to her deposition prior to the FTC
16 ruling to other companies.
17 Q. Do you know if the FTC ever
18 issued any warnings, letters of any kind to
19 Bell & Howell directly?
20 A. I don't know.
21 Q. Did the FTC bring actions
22 against any manufacturers?
23 A. My recollection is yes, but I'd
24 have to go through my report.
25 Q. Do you have any information to

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1 POTTER
2 indicate that the FTC brought any action
3 against Bell & Howell?
4 A. I have no information on that,
5 no.
6 Q. If the FTC did bring actions
7 against the manufacturers, where is that
8 published?
9 A. The FTC issued some
10 announcements about the enforcement actions
11 that they took and I have to find it in my
12 reports so give me a minute if you want me
13 to.
14 MR. OSTOJIC: What was the
15 question?
16 (Record read.)
17 A. Let me go to my reference
18 citations. In my reference citations 2001
19 Federal Trade Commission warns manufacturers
20 and retailers of ultrasonic pest control
21 devices and there is a URL cite mentioned in
22 a press release and there was another one in
23 2003, marketer of pest control devices
24 required to provide support for claims.
25 Again, from recollection there

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<p>1 POTTER</p> <p>2 are about 50 or 60 companies that they cited.</p> <p>3 Of course there were other investigations</p> <p>4 both by FTC and EPA on electromagnetic</p> <p>5 devices back around I want to say 1980, but</p> <p>6 I'd have to go back and check that.</p> <p>7 Q. Sir, are you aware of any order</p> <p>8 from any governmental agency be it the FTC or</p> <p>9 EPA to Bell & Howell concerning Bell &</p> <p>10 Howell' ultrasonic pest repellers?</p> <p>11 A. No.</p> <p>12 Q. Sir, are you aware of any</p> <p>13 recalls from any governmental agency</p> <p>14 including the Consumer Product Safety</p> <p>15 Commission with respect to the Bell & Howell</p> <p>16 devices which are the subject of this case?</p> <p>17 A. No.</p> <p>18 Q. Sir, are you aware of any state</p> <p>19 agency or local agency that's ever commenced</p> <p>20 any proceedings against Bell & Howell with</p> <p>21 respect to the Bell & Howell devices which</p> <p>22 are the subject of this case?</p> <p>23 A. No.</p> <p>24 Q. I'm going to Exhibit number 2,</p> <p>25 your rebuttal report. That's a true and</p> <p style="text-align: right;">185</p>	<p>1 POTTER</p> <p>2 immaterial to the way we conducted our</p> <p>3 experiments, I'm specifically referring here</p> <p>4 that it was immaterial to the ultimate</p> <p>5 performance of the products used by consumers</p> <p>6 for many of the reasons I've already talked</p> <p>7 about. Cleaning up food which is -- can be</p> <p>8 recommended and it can be of some use, but in</p> <p>9 and of itself you cannot clean up all the</p> <p>10 food so that's not going to resolve the</p> <p>11 problem of these devices not performing and</p> <p>12 as we talked about obstruction and places</p> <p>13 these pests live, does it really matter if</p> <p>14 you don't put it behind a couch if the</p> <p>15 cockroaches are living in the under side lip</p> <p>16 of the kitchen sink protected by wood and a</p> <p>17 cabinet so whether the obstruction is at the</p> <p>18 point where these critters are or whether</p> <p>19 it's next to the device, what's the</p> <p>20 difference so bottom line is I don't think</p> <p>21 whether they follow the instructions or not</p> <p>22 or whether they lost their instructions or</p> <p>23 not would have made a nickel's bit of</p> <p>24 difference in the performance of these</p> <p>25 devices.</p> <p style="text-align: right;">187</p>
<p>1 POTTER</p> <p>2 correct copy of your rebuttal report, right?</p> <p>3 A. Yes.</p> <p>4 Q. It's just rebutting any</p> <p>5 opinions that you reviewed with respect to</p> <p>6 the reports of Dr. Borth and Dr. Whitford,</p> <p>7 right?</p> <p>8 A. Correct.</p> <p>9 Q. On page 13 you have a</p> <p>10 subsection that says plaintiffs' alleged</p> <p>11 noncompliance with user instructions is</p> <p>12 immaterial?</p> <p>13 A. Correct.</p> <p>14 Q. What you're saying is it didn't</p> <p>15 matter to you what the Bell & Howell user</p> <p>16 instructions were when you were conducting</p> <p>17 the testing of those devices, fair?</p> <p>18 MR. KOPEL: Can you please read</p> <p>19 that question back.</p> <p>20 (Record read.)</p> <p>21 MR. KOPEL: Objection;</p> <p>22 misstates prior testimony.</p> <p>23 A. I'm going to need to read what</p> <p>24 I said underneath this header here. The way</p> <p>25 you phrase that question that it was</p> <p style="text-align: right;">186</p>	<p>1 POTTER</p> <p>2 Q. Is that true for all products,</p> <p>3 in other words, it doesn't really matter to</p> <p>4 you whether use instructions on any product</p> <p>5 is followed to determine the effectiveness of</p> <p>6 that product?</p> <p>7 A. Absolutely not.</p> <p>8 Q. Why is it different with the</p> <p>9 Bell & Howell device?</p> <p>10 MR. KOPEL: Objection;</p> <p>11 misstates prior testimony.</p> <p>12 A. It's different because based on</p> <p>13 prior literature, evaluating products as I</p> <p>14 said with very, very similar physical output</p> <p>15 characteristics and from our studies and from</p> <p>16 the inherent deficiencies or limitations of</p> <p>17 ultrasound as a pest controlling device,</p> <p>18 these caveats are immaterial now.</p> <p>19 If I don't follow the</p> <p>20 instructions on my medication, if you have</p> <p>21 taken a blood pressure medication, you darn</p> <p>22 well better follow the instructions, but in</p> <p>23 this case this is a totally different</p> <p>24 situation we are talking about with a device</p> <p>25 that would not in my opinion be effective</p> <p style="text-align: right;">188</p>



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1 POTTER
2 regardless of how these plaintiffs used it.
3 Q. wouldn't that be true though
4 with any pest management device if it's not
5 used in accordance with its instructions,
6 it's going to either decrease its
7 effectiveness or eliminate it; isn't it true?
8 A. If the device is inherently
9 effective when used properly, these devices
10 are not effective even when they are used
11 properly.
12 Q. But that's different than
13 saying following the instructions is
14 meaningless, isn't it?
15 A. When I said it's immaterial, I
16 don't think it has relevance to this case
17 whether these plaintiffs follow the
18 instructions or not. I didn't read the
19 depositions, but I'm inferring from some of
20 the expert reports that in some cases they
21 may have not read the instructions, but there
22 was not a lot of clarity in terms of what
23 they did or didn't do, it was very anecdotal,
24 but knowing what I know about these devices
25 and the way they have been evaluated by us

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1 POTTER
2 and by others and the limitations of these
3 devices, whether you follow the instructions
4 or not would be immaterial to this case in
5 terms of whether they would work or not.
6 To blame these people for this
7 device not working because they didn't follow
8 the instructions in my view is improper and
9 really not relevant.
10 Q. Isn't it because -- aren't you
11 critiquing the Bell & Howell devices because
12 they don't eliminate pests that may be hidden
13 behind barriers; isn't that the gist of your
14 conclusion?
15 A. Can you repeat the question?
16 Q. Sure. Isn't the gist of your
17 opinion on these devices is you critique them
18 because they don't get rid of pests that may
19 be behind walls or under floors?
20 A. No, there's a lot of reasons
21 why I critique these products and I put that
22 all into my reports and there is a lot of
23 limitations of these materials besides the
24 fact that the pests are hidden. Many of
25 these pests probably don't even have the

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1 POTTER
2 ability to detect ultrasound.
3 Q. why did you then have i2L and
4 Sierra do any testing if quite frankly you
5 didn't believe that these devices or the
6 technology of ultrasonic sound waves work at
7 all?
8 A. Because --
9 MR. KOPEL: I'm going to
10 caution you not to reveal any
11 communications with counsel. To the
12 extent you can answer without doing
13 so, fine, otherwise don't answer.
14 A. In reading the documents that I
15 did early on in this case, there was some
16 question as to whether previous studies that
17 were conducted with other products were
18 relevant to the consideration of how the Bell
19 & Howell products would perform so I felt it
20 was necessary to evaluate the specific
21 products that pertain to this case which Bell
22 & Howell sells to further demonstrate that
23 even if those particular products were
24 evaluated they would be ineffective.
25 Q. In your rebuttal report you

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1 POTTER
2 state on page 19 towards the bottom and I
3 quote, "At best, they" and I assume you are
4 talking about the Bell & Howell devices "may
5 temporarily discourage rodents from visiting
6 areas in buildings that have little cover
7 available." Did I read that correctly?
8 A. Yes.
9 Q. That's your opinion that you
10 wrote?
11 A. I need to read it in context of
12 paragraph 53. I didn't write this. This was
13 a direct quote out of Dr. Howard and Dr. Rex
14 Marsh's publication where they concluded that
15 at best there could be some temporary effect
16 which the rodents would habituate and adapt
17 to and again, it would need to be an area
18 with very little cover so this is a quote and
19 just for what it's worth, these guys are two
20 of the icons of -- these are rodentologists
21 from the University of California Davis. They
22 did probably 40 years of work on ultrasonic
23 devices and other types of devices to look at
24 the effects on rodents so this is a quote
25 from them, not from me. I'm simply restating

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1 POTTER
2 what they are stating and I agree with it.
3 Q. You agree that the Bell &
4 Howell devices would be effective if there
5 isn't cover provided for the pests?
6 MR. KOPEL: Objection;
7 misstates prior testimony.
8 A. If there was no cover and those
9 particular -- there certainly have been some
10 studies to show -- we know that rodents
11 detect ultrasound and in some circumstances
12 when they are exposed to ultrasonic pest
13 repellers, there is some initial response,
14 avoidance of the sounds.
15 Q. That would mean it's effective,
16 avoidance of the sounds? Doesn't that really
17 mean repelling, that they are being repelled?
18 MR. KOPEL: Counsel, please
19 don't interrupt the witness. You can
20 finish your answer to the last
21 question.
22 A. Can you read back the last
23 question or the last answer.
24 MR. KOPEL: Please read the
25 question and answer.

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1 POTTER
2 (Record read.)
3 A. So do you want to rephrase the
4 question?
5 MR. OSTOJIC: Read the next
6 question.
7 (Record read.)
8 A. First of all, technically it
9 doesn't mean they are being repelled, they
10 are being moved because repellency really has
11 to be directional based on gradient of a
12 stimulus. That being said, having worked
13 with pest problems my entire career and
14 trying to eliminate them in buildings to have
15 a temporary avoidance of an ultrasonic device
16 does not in and of itself means the device is
17 effective. Effective to me means that you
18 eliminate those pests from the building so I
19 think what these authors are conceding here
20 was that yes, in some circumstances rodents
21 can be deterred or moved or impacted by
22 ultrasound, but it's temporary and it is more
23 likely to occur in structures where there is
24 little or no cover.
25 Q. If a pest avoids a room where

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1 POTTER
2 there is the Bell & Howell ultrasonic device,
3 does that mean it's being repelled by the
4 device?
5 A. I'm sorry, could you repeat the
6 question.
7 (Record read.)
8 MR. KOPEL: Objection;
9 incomplete hypothetical.
10 A. No, not necessarily. It could
11 be avoiding that room for any number of
12 reasons.
13 Q. But if a pest avoids a room
14 because of the ultrasonic sounds from the
15 Bell & Howell device, would you then agree
16 with me that the pest is being repelled by
17 that device?
18 A. If it could be -- yes, if it
19 could be determined that the rodent was
20 responding to the ultrasound and it was
21 avoiding the sounds, you could say it was
22 being repelled by the device. I'm really
23 dealing with semantics --
24 MR. KOPEL: Please stop
25 interrupting the witness.

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1 POTTER
2 A. -- because the word repellency
3 infers a directed movement of organisms and
4 quite honestly I don't believe that was
5 evaluated in these studies and it has
6 particular relevance to the cockroach study
7 by Ballard and Gold in 1984 where at no point
8 did they concede that these cockroaches were
9 being repelled. They were being -- it
10 increased their movement and there is a
11 difference between those two.
12 Q. Do pests adapt to pesticides?
13 A. Yes, they do. Could you read
14 that back?
15 (Record read.)
16 A. Yes.
17 Q. You have new pesticides
18 continuously, don't you?
19 A. Yes, for a variety of reasons,
20 one of which is I think when you say adapt,
21 you may mean becoming resistant or immune to
22 the chemical, correct.
23 Q. Yes so you believe that pests
24 in this case, the pests enumerated in the
25 Bell & Howell user manual, that they could

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1 **POTTER**
2 adapt to the ultrasonic sounds, right?
3 A. Right.
4 Q. Isn't that true for all pest
5 management devices including insecticides and
6 pesticides?
7 A. Well, it's not exactly the
8 same. This adaptation and habituation and
9 avoidance of ultrasonic sounds has been
10 demonstrated repeatedly over 50 years of
11 working with these devices and it typically
12 occurs quite quickly in a matter of days or
13 perhaps a week or so. That's not the way --
14 when you launch a new insecticide, it better
15 not lose its effectiveness in days or weeks
16 or that manufacturer will lose a lot of
17 money.
18 Q. What's the device called that
19 has a sticky pad to it where they try to
20 force either a rodent or insect to get stuck
21 on the pad and essentially die?
22 A. Like a glue board.
23 Q. Are those effective?
24 A. Against rodents?
25 Q. Against any pest that they

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1 **POTTER**
2 claim to be effective against?
3 A. They can be. They have
4 limitations. Mature rodents often won't get
5 caught in a glue board, they avoid them.
6 Younger rodents less so. They are good for
7 monitoring from the standpoint of insects so
8 it depends on the details.
9 Q. Isn't that true with any
10 product? Every product has some limitation
11 to it, doesn't it?
12 A. Correct.
13 Q. For instance, those sticky pads
14 that I refer to, by the way, what's the name
15 that you call them?
16 A. Glue board for rodents. We
17 often call them sticky traps for insects.
18 Q. The sticky --
19 A. Glue boards.
20 Q. The glue boards, they won't
21 drive pests out from behind walls and under
22 floors, correct?
23 A. Correct.
24 Q. So you have to put them at a
25 spot where you think the pest will go or at

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1 **POTTER**
2 least try to lure the pest with food or
3 something else to bring the pest to that
4 sticky part, fair?
5 A. Fair.
6 Q. With pesticides as well, if you
7 put pesticide in your drain, that will not
8 drive pests out of your home, will it?
9 A. No.
10 Q. The pesticide has to be used
11 pursuant to the user instructions to be
12 effective if at all, correct?
13 A. Correct, but there is a big
14 difference between the use of a pesticide or
15 a repellant device by a lay person, a
16 homeowner, consumer than a professional and
17 professionals know how to use these various
18 devices where consumers are typically quite
19 naive in terms of what's necessary to make
20 these devices work or measure the
21 effectiveness of these devices.
22 Q. In the pest management world,
23 what are some of the devices other than the
24 ultrasonic repellers that are non-lethal if
25 you know?

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1 **POTTER**
2 A. The pest control industry does
3 not use ultrasonic devices, but as far as
4 other non-lethal devices, they use glue
5 boards, they use snap traps, they use --
6 these are lethal to the rodent, but not
7 lethal -- they are not pesticides; is that
8 what you're asking?
9 Q. Yes.
10 A. There's glue boards.
11 Q. Those are lethal to the pest,
12 that's what I mean?
13 A. Correct.
14 Q. In the pest management world
15 other than ultrasonic pest repellers, are
16 there any non-lethal devices being sold to
17 the public that you know of?
18 A. For rodent control?
19 Q. For pest control?
20 A. Sure.
21 Q. What is it?
22 A. That are non-lethal on the
23 pests, correct?
24 Q. Yes.
25 A. Well, exclusion, sealing up

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1 POTTER
 2 openings to deny entry of pests in the
 3 buildings.
 4 Q. Really if you use exclusion you
 5 don't need any other device, wouldn't that be
 6 fair?
 7 A. In a perfect world, but it's
 8 very different to build out all the potential
 9 entry points.
 10 Q. I take it that's expensive?
 11 A. Off the top of my head I cannot
 12 think of any device that's non-lethal to the
 13 pest that drives the pest out of the
 14 building.
 15 MR. OSTOJIC: I'm going to take
 16 a two minute break and finish up
 17 quickly.
 18 (Recess taken.)
 19 (Exhibit 5, Document, marked
 20 for Identification.)
 21 Q. Doctor, let me show you what we
 22 marked as Exhibit number 5. Take a look at
 23 it and tell me if you recognize it?
 24 A. I do.
 25 Q. What is it?

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1 POTTER
 2 A. This was a brief summary of the
 3 methodology and findings of Dr. Richard
 4 Mankin's testing.
 5 Q. Do you disagree with anything
 6 in Exhibit number 5 written by Dr. Mankin?
 7 A. No.
 8 Q. Do you accept Dr. Mankin's
 9 conclusions that he reached?
 10 A. Yes.
 11 Q. You adopted those conclusions
 12 in your report?
 13 A. That's correct.
 14 MR. OSTOJIC: Okay. I don't
 15 have any further questions. Thank
 16 you, sir.
 17 MR. KOPEL: I have no questions
 18 either. Dr. Potter will reserve the
 19 right to review the transcript and
 20 sign and my office will handle
 21 ordering of any copies.
 22 (Time noted: 3:20 p.m.)
 23
 24
 25

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1 A C K N O W L E D G M E N T
 2
 3 STATE OF)
 4 : ss
 5 COUNTY OF)
 6
 7 I, DR. MICHAEL POTTER, hereby certify
 8 that I have read the transcript of my
 9 testimony taken under oath in my deposition;
 10 that the transcript is a true, complete and
 11 correct record of my testimony, and that the
 12 answers on the record as given by me are true
 13 and correct.
 14
 15
 16
 17 DR. MICHAEL POTTER
 18
 19
 20 Signed and subscribed to before me,
 21 this day of , 2018.
 22
 23
 24
 25 Notary Public, State of _____

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1 C E R T I F I C A T E
 2
 3 STATE OF NEW YORK)
 4) ss.:
 5 COUNTY OF NEW YORK)
 6
 7 I, SHARI COHEN, a Notary Public
 8 within and for the State of New York, do
 9 hereby certify:
 10 That DR. MICHAEL POTTER, the witness
 11 whose deposition is hereinbefore set forth, was
 12 duly sworn by me and that such deposition is a
 13 true record of the testimony given by such
 14 witness.
 15 I further certify that I am not
 16 related to any of the parties to this action
 17 by blood or marriage; and that I am in no way
 18 interested in the outcome of this matter.
 19 IN WITNESS WHEREOF, I have hereunto
 20 set my hand this 17th day of January, 2018.
 21
 22
 23
 24
 25 SHARI COHEN

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1	2	3	4	5	6	7	8	9	A	account	agricultural	apartment
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